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SUPREME COURT OF THE UNITED STATES

October Term, 1940

No. 61

BEST & COMPANY, INC.
Appellant,

vs.

A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA

APPEAL FROM THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

BRIEF ON BEHALF OF A. J. MAXWELL, COMMISSIONER OF REVENUE OF THE STATE OF NORTH CAROLINA

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STATEMENT OF CASE

The Supreme Court of North Carolina in the case of BEST & COMPANY v. A. J. MAXWELL, Commissioner of Revenue of North Carolina, 216 N. C. 114 (petition to rehear, 217 N. C. 134), construed Section 121, Subsection (e) of the Revenue Act of North Carolina, Chapter 127 of the Public Laws of North Carolina of 1937, and held that under this Act as con-

strued and applied to the agreed statement of facts under which the case was submitted, the plaintiff (appellant herein) was not entitled to recover the sum of $250.00, tax paid by said appellant under protest.

The facts in this case are stipulated and appear in the record (R. p. 7). A succinct statement, however, is as follows:

The plaintiff, having decided that it wanted to sell goods, wares and merchandise in Winston-Salem, North Carolina, rented a room or rooms in the Robert E. Lee Hotel in that city. In the room goods, wares and merchandise were displayed, orders were taken from people who came in, and the goods, wares and merchandise were shipped from New York City. The plaintiff is not a regular retail merchant in the State of North Carolina and pays no tax in this State except the tax involved in this action.

The defendant, under authority of Subsection (e), Section 121, Public Laws, 1937, Revenue Act, levied a tax upon the Plaintiff, and the tax was paid under protest. This action is to recover the tax.

ARGUMENT

STATEMENT OF POSITION OF APPELLEE

The appellee takes the following position upon this appeal:

(1) The Supreme Court of North Carolina properly construed the statute as imposing a valid tax upon the use of local property in North Carolina against all persons in a designated class, whether resident or non-resident.

(2) The construction of a State statute by the highest court of the State is binding upon the Supreme Court of the United States.

(3) The taxing act does not violate the commerce clause of the Constitution of the United States.

(4) The taxing act does not violate Article IV, Section 2, or Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(5) The rule in ROBBINS v. SHELBY TAXING DISTRICT, 120 U. S. 489 does not apply to the statute involved in this case.

(6) The statute under consideration does not discriminate.

(7) The statute under consideration does not violate Section 1 of the Fourteenth Amendment to the Constitution of the United States.

I—THE SUPREME COURT OF NORTH CAROLINA PROPERLY CONSTRUED THE STATUTE AS IMPOSING A USE TAX

The opinion of the Supreme Court of North Carolina held that the provision of Chapter 127, Section 121 (e), of the Revenue Act of 1937 imposing a tax upon the display of samples of goods in a hotel room or temporarily occupied house for the purpose of securing orders for the retail sale of such goods by any person, firm or corporation not a regular retail merchant in the State does not impose a burden upon interstate commerce and is valid, since the tax is imposed alike upon residents and nonresidents engaged in the activity defined and is a use tax levied upon the local use of hotel rooms and temporarily occupied houses for the purpose of promoting retail sales by persons not otherwise taxed as retail merchants, and since the activity taxed is a preliminary and nonessential activity transpiring prior to the securing of orders for interstate shipment, in which activity the seller may or may not engage at his election.

The opinion, in part, says

> "It then becomes pertinent to determine whether it can be fairly said that the instant act, in this case, clearly constitutes a direct and undue burden upon interstate commerce. The measure is clear and concise; before it is applicable there most be the following requisites set forth in the law: (a) the act, i. e., the display of samples, goods, etc., (b) the place, i. e., in a hotel room or temporarily occupied house, (c) the mental element, or purpose,

i. e., for the purpose of securing orders for retail sale of goods, etc., and (d) the person, i.e., one not a regular merchant. In essence, the tax is one imposed upon anyone, not otherwise taxed as a retail merchant, who uses a North Carolina hotel room or temporarily occupied house, for commercial display purposes in the interest of retail sales. It is a use tax, levied in the State of North Carolina upon profitable and commercial activity which has otherwise escaped taxation and which, therefore, discriminates against no one but seeks to remove a discrimination previously existing against regular, taxed, retail merchants. Under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State. The measure does not in any way impinge upon the activities of the wholesale trade, nor does it discriminate against nonresidents. All citizens and residents of North Carolina, and nonresidents alike (other than retail merchants who have already been taxed for their commercial activities) who engage in the taxable activity are liable for the tax. The tax act is a local one, involving the use of purely local property. The tax in no way hampers the movement of the samples, goods, etc., or of the merchandise sold, in interstate commerce. The tax in no way regulates the interstate or out-of-state activity of the person seeking to sell by display in North Carolina, nor does it in any way interfere with sales by sample by house-to-house canvassers. Finally, the measure leaves open to the seller the choice as to the manner of soliciting retail sales by display; only when he seeks to localize his commercial activity by temporarily establishing himself at a rented and temporary location within this State in his activity in displaying samples and seeking orders subjected to taxation. Although such activity may be in the twilight zone of interstate commerce, it does not enter that enchanted realm. Although such displaying by sample may ultimately result in orders which will flow into interstate commerce, such commercial activity cannot cloak itself in immunity from taxation merely by calling the magic words, "Interstate Commerce." The use of North Caro-

lina real estate for the purpose of displaying samples is commercially intended to result in interstate commerce, but this preliminary activity is merely a separate and distinct effort of the seller seeking as in the instances of magazine and billboard advertising to stimulate the desire for the seller's goods. WESTERN LIVESTOCK v. BUREAU OF REVENUE, 303 U. S. 250.

"The display use of hotel rooms and temporarily rented property here taxed is not a usual, necessary, or essential part of a commercial, retail business. It is a preliminary and incidental activity which, at the election of the seller, may or may not transpire prior to the beginning of the flow of event which constitute the movement of goods in interstate commerce. There is a striking analogy here to production, which has consistently been held not to constitute interstate commerce. CARTER v. CARTER COAL CO., 298 U. S., 238."

The very complete and lucid analysis by the Supreme Court of North Carolina of the taxing statute found in the opinion amply supported the conclusion reached by that Court, that the tax was a use tax imposed by the State of North Carolina on local property which might be used by the lessee for securing orders for local or interstate shipments of merchandise. The opinion of the Supreme Court of North Carolina provides a definite and complete construction of the act in question, at variance with the construction placed upon said act by the appellant.

II—THE CONSTRUCTION OF A STATE STATUTE BY THE HIGHEST COURT OF THE STATE IS BINDING UPON THE SUPREME COURT OF THE UNITED STATES

The constitutionality of a State statute must be decided upon the construction that the State Supreme Court has placed upon the statute.

MIDLAND REALTY CO. v. KANSAS CITY POWER & LIGHT CO., 300 U. S. 109, 81 L. Ed. 540;

MEMPHIS & CH. R. CO. v. PACE, 282 U. S. 241, 75 L. Ed. 315;

HIGHLAND FARMS DAIRY v. AGNEW, 300 U. S. 608, 81 L. Ed. 835;

CHICAGO M. & ST. P. R. CO. v. RISTY, 276 U. S. 567, 72 L. Ed. 703;

LAUF v. E. G. SHINNER & CO., 303 U. S. 323, 82 L. Ed. 872;

J. BACON & SONS v. MARTIN, 305 U. S. 380, 83 L. Ed. 233.

The decision of the highest court of North Carolina, to the extent it is not changed upon petition to rehear, becomes the law in this case as to the nature and character of the tax, and the construction is conclusive on the Federal Court as to State law.

WILLIAMS v. EGGLESTON, 170 U. S. 304.

The appeal in this case, therefore, essentially involves the right of the State court to construe a State taxing statute and, in effect, asserts that the construction placed upon a State statute by the highest court of appeal in such State is not binding upon the Supreme Court of the United States. This is contrary to the decisions of this Court.

The principle that the construction placed upon a state law by the highest court of that state is conclusive upon the Supreme Court of the United States is so well established that the appeal in the case of *J. Bacon & Sons v. Martin, supra,* was dismissed by a "per curiam" opinion.

The tax statute imposed a tax on "the receipt of cosmetics in the State by any retailer." The Kentucky court held that the word "receipt" is not used in a limited sense, but in the sense that it has already been received by the retailer and is now in his use. Upon this construction the court of Kentucky sustained the law, and the Supreme Court of the United States said:

"The construction of the statute by the state court is binding upon us. Supreme Lodge, Knights of Pythias v. Meyer, 265 U. S. 30, 32, 33, 44 S. Ct. 432 433, 68 L. Ed. 885; Hicklin v Coney, 290 U. S. 169, 172, 54 S. Ct. 142, 144, 78 L. Ed. 247; Hartford Accident & Indemnity Co. v. N. O. Nelson Manufacturing Co., 291 U. S. 352, 358, 54 S. Ct. 392, 394, 78 L. Ed. 840. And in the light of its construction the state court applied the principles declared in our decisions. Monamotor Oil Company v. Johnson, 292 U. S. 86, 93, 54, S. Ct. 575, 578, 78 L. Ed. 1141; Gregg Dyeing Co. v. Query, 286 U. S. 472, 478, 479, 52 S. Ct. 631, 633, 634, 76 L. Ed. 1232, 84 A. L. R. 831; Nashville, C. & St. L. Rwy. Co. v Wallace, 288 U. S. 249, 265, 266; 53 S. Ct. 345, 349, 77 L. Ed. 730, 87 A. L. R. 1191; Edelman v. Boeing Air Transport, Inc., 289 U. S. 249, 252, 53 S. Ct. 591, 592, 77 L. Ed. 1155."

III—THE TAXING ACT DOES NOT VIOLATE THE COMMERCE CLAUSE OF THE CONSTITUTION OF THE UNITED STATES

1. The tax imposed by the statute under examination is imposed upon the use of "any hotel room" or the use of "any house rented or occupied temporarily" for the display of samples, goods, wares, or merchandise.

Public Laws of 1937, Chapter 127, Section 121 (e);

BEST & COMPANY, INC. v. MAXWELL, 216 N. C. 114.

Cases which condemn taxes levied by states directly upon the business of offering for sale or selling goods by a non-resident in interstate commerce, have no application to the tax here under consideration. ROBBINS v. SHELBY COUNTY TAXING DISTRICT, 120 U. S. 489, and the other cases cited by Best & Company, Inc., in its brief have no application to the tax here under consideration. See Appendix A.

The taxing statute as construed by the Supreme Court of North Carolina, which is binding upon this Court as to the nature and character of the tax, is excluded from the condemnation of the decision in the ROBBINS v. SHELBY COUNTY TAXING DISTRICT Case, Supra, and similar cases, by the

language of the opinion in McGOLDRICK v. BERWIND-WHITE COAL MINING CO., 308 U. S. 33; 60 S. Ct. 388, in which it is said:

> "It is enough for the present purpose that the rule of ROBBINS v. SHELBY COUNTY TAXING DISTRICT, supra, has been narrowly limited to fixed sum license taxes imposed on the business of soliciting orders for the purchase of goods to be shipped interstate."

In the present case there is a fixed sum license, but as construed by the Supreme Court of North Carolina, the tax is not imposed on the business of soliciting orders for the purchase of goods to be shipped interstate, but is imposed for the use of local property in North Carolina.

2. The tax reaches those who are not regular retail merchants in the State of North Carolina as distinguished from regular retail merchants in the State of North Carolina. Retail merchants are defined in Public Laws of 1937, Chapter 127, Section 404, subsection 5, and these retail merchants are taxed under Public Laws of 1937, Chapter 127, Section 405, for engaging in and conducting such business, and under subsection (B) of the same section, 3% of the total gross sales. One not a regular retail merchant in North Carolina but engaging in merchandising by securing orders for the retail sale of goods, wares, or merchandise is subject only to the tax imposed by the statute under question when temporary use is made of any hotel room or house.

The regular retail merchant in North Carolina is subject to other taxes, but it is by the statute under question that one not a regular retail merchant in North Carolina is made to bear some part of the cost of government. It is the nature of the business in which he engages that requires the fixing of a specified tax which is, though not stated in the law, in lieu of all other taxes to the State of North Carolina.

3. The tax imposed by the statute is not related to the movement of any article in commerce. It is not imposed for the movement in interstate commerce, nor does it relate to the right to move or to the offer to move an article in inter-

state commerce. It is the same for the use of the hotel room or the house independent of any sale, and accrues before any act is performed which may, coupled with other acts, result in the movement of an article intrastate or interstate commerce. The use of the hotel room or the house is taxed the same whether the use is by a resident of North Carolina or a non-resident of the state.

The use of a hotel room or house is taxed the same whether or not, as a result, a sale is negotiated, and whether or not, assuming a sale is negotiated, a shipment of goods is required intrastate or interstate.

4. The privilege of *use* is only one attribute, among many of the bundle of privileges that make up property or ownership.

HENNEFORD v. SILAS MASON CO., 300 U. S. 577.

This right of the State to tax the privilege of *use* is approved in the HENNEFORD Case as follows:

> "The privilege of use is only one attribute, among many of the bundle of privileges that make up property or ownership. NASHVILLE, C. & ST. L. RY. CO. v. WALLACE, supra; BROMLEY v. McCAUGHN, 280 U. S. 124, 136-138, 50 S. Ct. 46, 48, 74 L. Ed. 226; BURNETT v. WELLS, 289 U. S. 670, 678, 53 S. Ct. 761, 764, 77 L. Ed. 1439. A state is at liberty, if it pleases, to tax them all collectively, or to separate the fagots and lay the charge distributively. Id. Calling the tax an excise when it is laid solely upon the use (VANCOUVER OIL CO. v. HENNEFORD, 183 Wash. 317, 49P. (2d) 14), does not make the power to impose it less, for anything the commerce clause has to say of its validity, than calling it a property tax and laying it on ownership. 'A nondiscriminatory tax upon local sales . . . has never been regarded as imposing a direct burden upon interstate commerce and has no greater or different effect upon that commerce than a general property tax to which all those enjoying the protection of the state may be subjected.' EASTERN AIR TRANSPORT, INC. v. SOUTH CAROLINA TAX COM-

MISSION, 285 U. S. 147, 153, 52 S. Ct. 340, 341, 76 L. Ed. 673. A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate. NASHVILLE, C. & ST. L. RY. CO. v. WALLACE, supra; EDELMAN v. BOEING AIR TRANSPORT, INC., supra; MONAMOTOR OIL CO. v. JOHNSON, supra; Cf. VANCOUVER OIL CO. v. HENNEFORD, supra."

5. The mere formation of a contract between persons in different states is not within the protection of the commerce clause.

WESTERN LIVE STOCK v. BUREAU OF REVENUE, 303 U. S. 250, at 253, deals with a tax challenged under the commerce clause in the following language:

"Appellants insist here, as they did in the state courts, that the sums earned under the advertising contracts are immune from the tax because the contracts are entered into by transactions across state lines and result in the like transmission of advertising materials by advertisers to appellants, and also because performance involves the mailing or other distribution of appellants' magazines to points without the State.

"That the mere formation of a contract between persons in different states is not within the protection of the commerce clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question. PAUL v. VIRGINIA, 8 Wall. 168, 19 L. Ed. 357; HOOPER v. CALIFORNIA, 155 U. S. 648, 15 S. Ct. 207, 39 L. Ed. 297; NEW YORK LIFE INS. CO. v. DEER LODGE COUNTY, 231 U. S. 495, 34 S. Ct. 167, 58 L. Ed. 332. Cf. WARE & LELAND v. MOBILE COUNTY, 209 U. S. 405, 28 S. Ct. 526, 52 L. Ed. 855, 14 Ann. Cas. 1031; ENGEL v. O'MALLEY, 219 U. S. 128, 31 S. Ct. 190, 55 L. Ed. 128. Hence it is unnecessary to consider the impact of the tax upon the advertising contracts except as it affects their performance, presently to be discussed. Nor is taxation

of a local business or occupation which is separate and distinct from the transportation and intercourse which is interstate commerce forbidden merely because in the ordinary course such transportation or intercourse is induced or occasioned by the business. WILLIAMS v. FEARS, 179 U. S. 270, 21 S. Ct. 128, 45 L. Ed. 186; WARE & LELAND v. MOBILE COUNTY, supra; BROWNING v. WAYCROSS, 233 U. S. 16, 34 S. Ct. 578, 58 L. Ed. 828; GENERAL RAILWAY SIGNAL CO. v. VIRGINIA, 246 U. S. 500, 510, 38 S. Ct. 360, 62 L. Ed. 854; UTAH POWER & LIGHT CO. v. PFOST, 286 U. S. 165, 52 S. Ct. 548, 76 L. Ed. 1038. Here the tax which is laid on the compensation received under the contract is not forbidden either because the contract, apart from its performance, is within the protection of the commerce clause, or because as an incident preliminary to printing and publishing the advertisements the advertisers send cuts, copy and the like to appellants.

At page 254, the Court further says:

"It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' POSTAL TELEGRAPH-CABLE CO. v. RICHMOND, 249 U. S. 252, 259, 39 S. Ct. 265, 266, 63 L. Ed. 590; FICKLEN v. SHELBY COUNTY TAXING DISTRICT, 145 U. S. 1, 24, 12 S. Ct. 810, 36 L. Ed. 601 (citing other cases); and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business. He is subject to a property tax on the instruments employed in the commerce, WESTERN UNION TELEGRAPH CO. v. MASSACHUSETTS, 125 U. S. 530, 8 S. Ct. 961, 31 L. Ed. 790 (citing other cases); and if the property devoted to interstate transportation is used both within and without the state, a tax fairly apportioned to its use within the State will be sustained, PULLMAN'S PALACE-CAR CO. v. PENNSYLVANIA, 141 U. S. 18, 11 S. Ct. 876, 35 L. Ed. 613, CUDAHY PACKING CO.

v. MINNESOTA, 246 U. S. 450, 38 S. Ct. 373, 62 L. Ed, 827. Net earning from interstate commerce are subject to income tax, UNITED STATES GLUE CO. v. OAK CREEK, 247 U. S. 321, 38 S. Ct. 499, 62 L. Ed. 1135, Ann. Cas. 1918E, 748, and, if the commerce is carried on by a corporation, a franchise tax may be imposed, measured by the net income from business done within the state, including such portion of the income derived from interstate commerce as may be justly attributable to business done within the state by a fair method of apportionment, UNDERWOOD TYPEWRITER CO. v. CHAMERLAIN, 254 U. S. 113, 41 S. Ct. 45, 65 L. Ed. 165. Cf. BASS, RATCLIFF & GRETTON, LTD. v. STATE TAX COMMISSION, 266 U. S. 271, 45 S. Ct. 82, 69 L. Ed. 282.

"All of these taxes in one way or another add to the expense of carrying on interstate commerce, and in that sense burden it; but they are not for that reason prohibited. On the other hand, local taxes, measured by gross receipts from interstate commerce, have often been pronounced unconstitutional. The vice characteristic of those which have been held invalid is that they have placed on the commerce burdens of such a nature as to be capable in point of substance, of being imposed, FARGO v. STEVENS, MICHIGAN, 121 U. S. 230, 7 S. Ct. 857, 30 L. Ed. 888; PHILADELPHIA & S. M. S. S. CO. v. PENNSYLVANIA, 122 U. S. 326, 7 S. Ct. 1118, 30 L. Ed. 1200 (citing other cases); with equal right by every state which the commerce touches, merely because interstate commerce is being done, so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce. See PHILADELPHIA, & S. M. S. S. Co. v. PENNSYLVANIA, supra, 122 U. S. 326, 346, 7 S. Ct. 1118, 30 L. Ed. 1200 (citing other cases): BRADLEY J., dissenting in MAINE v. GRAND TRUNK RAILWAY CO., 142 U. S. 217, 235, 12 S. Ct. 121, 163, 35 L. Ed 994. Cf. PULLMAN'S PALACE-CAR CO. v. PENNSYLVANIA, supra, 141 U. S. 18, 26, 11 S. C. 876, 35 L. Ed. 613. The multiplication of state taxes measured by the gross receipts from interstate transactions would spell

> the destruction of interstate commerce and renew the barriers to interstate trade which was the object of the commerce clause to remove. BALDWIN v. G. A. F. SEELIG, 294 U. S. 511, 523, 55 S. Ct. 497, 500, 79 L. Ed. 1032, 101 A. L. R. 55."

In the instant case the Plaintiff (appellant) used a hotel room from which its representative solicited orders. It is very significant that in the WESTERN LIVESTOCK Case the income taxed included that derived from an out-of-state advertiser who sent his cut to the publisher to occupy space in the magazine, the publishing of which solicited orders to be filled by the out-of-state advertiser. In many instances, no doubt, orders came from out-of-state readers of the magazine and thus the state was allowed to take tribute only because of the use of the magazine space to solicit orders. It is no less a use of property because the plaintiff, in the instant case, chose to occupy a hotel room and not a space in a magazine published in North Carolina.

6. A definite separate act done or performed within a state may be taxed even where the act assists in a movement in interstate commerce.

COVERDALE v. ARKANSAS-LOUISIANA PIPE LINE CO., 303 U. S. 604, 611.

In the COVERDALE Case the tax was applied upon the creation of energy which was used in pushing along, in its passage from one state to another, the contents of a pipe line used for interstate transportation. The court said at 611:

> "The power used by appellee is obtained from internal combustion engines which transform the potential energy of natural gas into mechanical power, transmitted by piston and piston-rod from the combustion chamber of the engine to the compression chamber of the compressor. While the engine and compressor units are assembled on a common bed plate, their functions are thus seen to be as completely separate as if they operated

through belting. The engine is the 'prime mover' of the tax act, producing power to drive the compressor. While the use of the engine for the production of power synchronizes with the transmission of that power to the compressor, production occurs prior to transmission. It is just as much local as the generation of electrical power."

Having located the "prime mover," the Court says at 612:

"Third. To determine whether this challenged state tax enactment is invalid as an interference with interstate commerce under the decisions of this Court, the connection of the privilege taxed with interstate commerce has been considered. Other factors also show that the tax here does not interfere with interstate commerce. The tax is without discrimination in form or application as between inter and intra state commerce and it cannot be imposed by more than one state. The course of interstate commerce is clogged by taxes designed or applied so as to hamper its free flow. Section three, however, bearing equally on all use, is only complementary to the taxes of sections 1 and 2 HENNEFORD v. SILAS MASON CO., 300 U. S. 577, 584, 57 S. Ct. 524, 527, 81 L. Ed. 814. It bears generally on all use of power and is not discriminatory. It obviously adds to the cost of the interstate commerce. But increased cost alone is not sufficient to invalidate the tax as an interference with that commerce WESTERN LIVESTOCK v. BUREAU OF REVENUE 303 U. S. at 250, 58 S. Ct. 546, 82 L. Ed. 823, supra."

In the instant case the hotel room is the "prime mover"—that place or thing giving the agent of plaintiff the opportunity to exert a push upon the commerce contemplated. The hotel room was the chamber in which the purchaser met the seller and made a contract. Into the hotel room came the prospective looker and buyer to produce the demand for the transmission of merchandise. The agent in charge was the medium through which the orders were taken and transmitted,—he was the compressor. Without the hotel room

plaintiff in this case would have been without the place to produce the business which can be freely transmitted after this use of the room for the creation of the business. That use of that hotel room was just as much local as the use by a regular retail merchant of his store space is local.

7. The commerce clause does not close the door to the state's power to tax property used in connection with interstate commerce, nor does it prevent a tax upon the use of property within a state even where the use is in connection with interstate commerce.

POSTAL TELEGRAPH-CABLE CO. v. RICHMOND, 249 U. S. 252;

EASTERN AIR TRANSPORT, INC. v. TAX COMMISSION, 285 U. S. 147;

NASHVILLE, CHATTANOOGA & ST. LOUIS RY. v. WALLACE, 288 U. S. 249;

EDELMAN v. BOEING AIR TRANSPORT, INC., 289 U. S. 249.

8. If the tax under question complements local taxes against regular merchants, it is not to be condemned because levied by the State of North Carolina.

GENERAL AMERICAN TANK CAR CORP. v. DAY, 270 U. S. 367.

The rule stated in the above case is in the following language:

> "When the taxing statute which is in lieu of a local tax assessed on residents discloses no purpose to discriminate against non-resident taxpayers, and in substance, does not do so, it is not invalid merely because equality in its equation, as compared with local taxation has not been attained with mathematical exactness."

9. The taxing statute, as the nature and character of the tax imposed has been fixed by the highest court of the state, does

not levy any tax which can be cumulative and multiplied by each state through which pass the articles sold. Taxing the use of the hotel room in North Carolina is an act which cannot be duplicated in any other state. The property right is local to the state where the appellant is taxed. Only taxes which are cumulative and can be multiplied on the same commerce by each state through which the commerce passes, and not taxes upon local property or the use of local property, have been condemned as violating the commerce clause.

WESTERN LIVESTOCK v. BUREAU OF REVENUE, 303 U. S. 250.

IV—THE TAXING ACT DOES NOT VIOLATE ARTICLE IV, SECTION 2, OR SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

The appellant seeks to invoke two additional provisions of the Constitution of the United States, namely (a) Article IV, Section 2, which entitles the citizens of each state to all privileges and immunities of citizens in the several states, and (b) the privileges and immunities clause and the equal protection clause of the Fourteenth Amendment, Section 1.

(a)

Art. IV, Sec. 2—

"The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states."

Corporations are not citizens within the meaning of this clause but applies only to natural persons, members of the body politic owing allegiance to the State, not to artificial persons created by the legislature and possessing only the attributes which the legislature has prescribed.

PAUL v. VIRGINIA, 8 Wall. 168;
BLAKE v. McCLUNG, 172 U. S. 239;
SULLY v. AMERICAN NAT'L BANK, 178 U. S. 289;
NORFOLK & W. R. CO. v. PENNSYLVANIA, 136 U. S. 114.

(b)

Amendment 14, Sec. 1.

"..... No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

1. It is well settled that a corporation cannot claim the protection of the clause of the Fourteenth Amendment which secured the privileges and immunities of citizens of the United States against abridgment or impairment by the law of a State.

SELOVER, B. & CO. v. WALSH, 226 U. S. 112;
BEREA COLLEGE v. KENTUCKY, 211 U. S. 45;
LIBERTY WAREHOUSE CO. v. BURLEY TOBACCO GROWERS CO-OP. MARKETING ASSO. 276 U. S. 71;
ORIENT INS. CO. v. DAGGS, 172 U. S.; 557;
GROSJEAN v. AMERICAN PRESS CO., 297 U. S. 233.

2. It is settled that the equal protection clause of the Fourteenth Amendment does not preclude the States from resorting to classification for the purpose of legislation, and this power of the States is of wide range and flexibility.

COLGATE v. HARVEY, 296 U. S. 404;
ROYSTER GUANO Co. v. VIRGINIA, 253 U. S. 412;
LOUISVILLE GAS & E. CO. v. COLEMAN, 277 U. S. 32.

Classification must be based on a real and substantial difference. It may not be altogether illusory, but where there is a difference, it need not be great or conspicuous.

SOUTHERN R. CO. v. GREENE, 216 U. S. 400;
QUAKER CITY CAB CO. v. PENNSYLVANIA, 277 U. S. 389;

COLGATE v. HARVEY, 296 U. S. 404;
ROSYTER GUANO CO. v. VIRGINIA, 253 U. S. 412;
KEENEY v. NEW YORK, 222 U. S. 525;
STATE TAX COMRS. v. JACKSON, 283 U. S. 527.

Equal protection is not denied merely by adjusting revenue laws and taxing systems so as to favor certain industry, even if the tax law favors a regular North Carolina merchant over one who is not a regular North Carolina merchant.

QUONG WING v. KIRKENDALL, 223 U. S. 59;

HAMMOND PACKING CO. v. MONTANA, 233 U. S. 331.

It is not the function of the Court to consider the propriety or justness of the tax, the motives for its enactment, nor the public policy which prompted it. The Court considers only the classification and it is enough if the classification is real and does not favor one as against another of the same class.

STATE TAX COMRS. v. JACKSON, 283 U. S. 527;
GIOZZA v. TIERNAN, 148 U. S. 657.

D—THE RULE IN ROBBINS v. SHELBY TAXING DISTRICT, 120 U. S. 489 DOES NOT APPLY TO THE STATUTE INVOLVED IN THIS CASE.

The appellant, in its brief, is relying principally upon the rule stated in the ROBBINS Case and other cases applying the same rule. The rule in the ROBBINS Case does not apply to the tax here under consideration, as the taxing statute has been construed by the Supreme Court of North Carolina. The Supreme Court of the United States is bound by the construction placed upon the statute by the highest court of North Carolina, and if the tax is condemned, it must be upon some other basis than upon the rule in the ROBBINS Case.

There is attached hereto an analysis showing the statute and the holding of the court in each case listed in the Table of Cases in the plaintiff's brief dealing with the effect of a statute on interstate commerce. An examination will show that the statutes involved deal with (a) taxes upon sales made by drummers or peddlers as representatives of a foreign person or corporation or that require license before such sales can be made; (b) taxes against agents of express or railroad companies acting for interstate carriers; (c) taxes imposed in connection with the right of a corporation to exercise its franchise privileges within the state; (d) taxes

imposed upon the sale of goods imported from foreign countries; (e) the Anti-Trust Act; (f) the Grain Futures Act; (g) the Bituminous Coal Conservation Act of 1935; and (h) the National Labor Relations Act.

It is respectfully submitted that none of these cases, upon examination will overthrow the sound reasoning of the State court in its decision in this case or in any way contradict the contentions made by the defendant in his brief upon the appeal. Mere numbers do not outweigh principles, and the cases upon which the court relied in its opinion are not modified, overruled, or in any other manner changed by the opinions relied upon by the plaintiff, and since ROBBINS v. SHELBY, supra, is used extensively throughout the brief of the plaintiff, it seems safe to say that the plaintiff has not elected to deal with the field covered by the decisions of the Supreme Court of the United States relied upon by the defendant in urging the validity of the statute in issue. It is quite different for the statute to provide that before a person can make a sale as a representative of another he shall procure a license to make that sale, or, if he makes a sale as the representative of another, he shall pay a tax on that sale, and for the statute to say that for the use of a hotel room or a house rented or occupied termorarily in North Carolina a tax shall be paid.

It is urged by the plaintiff that the "use purpose" clause in the statute at issue controls as to the intent of the Legislature and that the statute imposes a tax upon one securing orders for the retail sale of goods, wares, or merchandise. The answer to this contention is the simple statement that the courts will not take interpretation of a statute which will destroy it if there is another interpretation equally apparent which will sustain the statute. The tax does not apply unless the hotel room or house is rented or occupied by the person, firm, or corporation not a regular retail merchant in the State of North Carolina. The statute does not apply to one who occupies a hotel room as a guest or for a conference, or rents or occupies temporarily a house as a home or for public meeting purposes. The statute does not tax orders for the retail sale of such goods. The Court will not assume that

the Legislature intended to enact a statute which would be invalid, but, on the other hand, the Court will assume that it was the intention of the Legislature to enact a valid statute and that in drawing the statute it had in mind the prohibitions under the commerce clause.

It is respectfully submitted that the decision of the State Court upon the question of the validity of the statute as affected by the commerce clause of the Constitution of the United States is sound and is sustained by authority of the Supreme Court of the United States.

As pointed out in the brief in this case on behalf of the defendant, the tax will be sustained if it is a legitimate tax, even though its name may be one thing and its application another. In this connection, it would seem that the plaintiff has fallen into a very unusual and unjustifiable position that a use tax is not a tax upon one not the owner for the privilege of temporarily occupying some one else's real property, when, as a matter of fact, the renting of a hotel room for one day is as much the exercise of the ownership of that room for the day as the leasing of a piece of land for fifty years, except as to the time for enjoyment and as to the use to which the respective properties can be put. The Legislature certainly has the right to pass a use tax, and to levy the tax upon any use which it thinks is sufficient to justify the tax. The State Court follows well recognized authority in holding that the tax imposed by the statute at issue is levied upon the use of a local hotel room or a house rented or temporarily occupied.

VI—THE STATUTE UNDER CONSIDERATION DOES NOT DISCRIMINATE.

The appellant contends that the taxing statute discriminates against it. This contention is not sound.

An examination of the taxing statute discloses that it is not discriminatory. The tax applies to the use of "any hotel room" or " any house rented or occupied temporarily", whether "rented or occupied" by a resident of North Carolina or a non-resident of North Carolina, if the person, firm or corporation is not a "regular retail merchant" in the State of North Carolina. It prevents a resident setting up, in a hotel

room or in a house rented or occupied temporarily, an establishment so like the establishment of a regular retail merchant as to be hardly distinguishable except by its temporary nature or an establishment that can compete with the regular retail merchants without comparable contribution to the support of the state government.

The tax applies to a non-resident only when he uses property or the rights of property which is local to North Carolina. THE TAX IS NOT, THEREFORE, DISCRIMINATORY AGAINST THE NON-RESIDENT because the statute taxes the non-resident only in those cases, and in the same amount that it taxes the resident who is not a regular retail merchant. The act under consideration shows a very careful and deliberate effort to place regular retail merchants and those not regular retail merchants upon the same footing so far as possible. If this is accomplished by taxing a right used by a non-resident in North Carolina by a method not condemned by the courts, then the tax must stand.

The tax "is a use tax, levied in the State of North Carolina upon profitable and commercial activity which has otherwise escaped taxation *and which, therefore, discriminates against no one but seeks to remove a discrimination previously existing against regular, taxed retail merchants.* Under this statute the act taxed must occur in North Carolina, and the room where the act transpires must be within the State. The taxed activity must be directed at the retail trade in North Carolina, seeking to reach personally the citizens and residents of this State. The measure does not in any way impinge upon the activities of the wholesale trade, *nor does it discriminate against non-residents. All citizens and residents of North Carolina, and non-residents alike (other than retail merchants who have already been taxed for their commercial activities.) who engage in the taxable activity are liable for the tax.*" (BEST v. MAXWELL, 216 N. C. 114.)

(Underscoring supplied).

The cases cited by the appellant, CALDWELL v. NORTH CAROLINA, 178 U. S. 622, 626, and NORFOLK & WEST. RY. v. SIMS, 191 U. S. 441, are not in point.

In CALDWELL v. NORTH CAROLINA, it was held that

an ordinance of the City of Greensboro, under which a license fee was required to be paid by an agent of a non-resident portrait company which shipped frames and pictures to the agent, who assembled them and delivered them to fill orders previously obtained, was invalid. The Court considered the license to be a direct burden on interstate commerce and hence, invalid. Therefore, it made no difference whether the act was discriminatory, since any tax on a purely interstate transaction was forbidden.

In NORFOLK & WEST. RY. v. SIMS the United States Supreme Court held that a North Carolina statute imposing a license tax on those "engaged in the business of selling" sewing machines in the State was an unconstitutional interference with interstate commerce so far as applied to the sale of a single machine shipped into the State by a non-resident manufacturer, upon the written order of a customer, under an ordinary C. O. D. consignment. It is apparent from a mere statement of the case that the transaction sought to be taxed was clearly within the ordinary concept of "interstate commerce," and as such, could not be interfered with by State laws. The case is not based, and does not purport to be based, on discrimination.

In DOUGLAS AIRCRAFT COMPANY v. JOHNSON, 90 Pac. (2d) 572 (1939) it was held, on the basis of SO. PAC. CO. v. GALLAGHER, 59 Sup. Ct. 389, (1939), and TEL. & TEL. CO. v. GALLAGHER, 59 Sup. Ct. 396 (1939) that a state statute taxing the use of personal property did not constitute a direct burden upon and discrimination against interstate commerce in violation of the commerce and due process clauses of the constitution. The personal property in question consisted of supplies and equipment purchased outside of the state and brought into the state to be used there by the purchaser.

These cases sustain use taxes on articles imported into a state. Where, as in this case, the use of a thing already in the state is taxed, i. e., the hotel room or residence, how much more reasonable it is to hold that there has been no discrimination against interstate commerce.

VII—THE STATUTE UNDER CONSIDERATION DOES NOT VIOLATE SECTION 1 OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

It is urged that North Carolina has no taxing jurisdiction in this case because the tax is one upon the doing of business by the appellant outside the State of North Carolina, and upon appellant's merchandise situated outside of the State. It has been amply demonstrated elsewhere in appellee's brief that the tax is not one on an interstate commerce transaction. Appellant cannot rely on the "due process" provision in this case, unless it prevails also on the "commerce" argument, because the tax not being discriminatory, appellant's theory of "due process" can be founded only upon a lack of jurisdiction, which exists in this case only if an interstate transaction is being taxed.

When the highest court of the State of North Carolina has construed the statute here under attack and has stated the nature and character of the tax, the Supreme Court of the United States is bound by that construction. Under the construction by the state Court, the statute levies a tax upon the use of property in the State of North Carolina, property which, while being enjoyed by the appellant, enables it to maintain a real mercantile establishment performing all the functions of a permanent department store, except that of making immediate delivery. For this use of the property for the setting up of such an establishment the Legislature of North Carolina has fixed this tax and the Supreme Court of North Carolina has approved the tax. The Legislature did not tax "taking orders," "shipping into the State of merchandise," nor the "soliciting of orders in the State." The Legislature did not require a license of the appellant before it was permitted to do any of the things the Supreme Court of the United States has said the appellant could do without interference through taxation by the State of North Carolina. The Legislature said not only to the non-resident appellant, but to all who were not regular retail merchants in the State of North Carolina, that a desire to and a consummation of the desire by the renting of a hotel room, or a house, and occupying it temporarily for setting up a mercantile establishment doing all the things

usually done except making immediate delivery of goods purchased, should result in the incurring of the tax imposed by the statute here under consideration. If the action of the Legislature of North Carolina be a denial of due process, or a denial of any right guaranteed to the appellant by the Constitution of the United States, then let the states of this union take care that the denial of the right to tax the use made of property, or its rights, wholly local to the state, does not result, through greatly broadening application, in sources of present taxation being eliminated by adaptation of methods of doing business by the use of property protected as the appellant would have it protected.

CONCLUSION

The Supreme Court of North Carolina has determined the nature and character of the tax here under consideration. A tax of the nature and character determined by the highest court of North Carolina does not violate any of the provisions of the Constitution of the United States. It is, therefore, respectfully submitted that this appeal should be dismissed.

Respectfully submitted,

Dated November 2, 1940,

at Raleigh, N. C.

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APPENDIX "A"

Analysis of Opinions of the United States Supreme Court and certain state courts appearing in "Table of Cases" in "Brief of Appellant."

(The cases here appear in the order listed in the "Table of Cases.")

DECIDED

Oct. 20, 1924—AIR-WAY CORP. v. DAY, 266 U. S. 71, 45 S. Ct. 12.

Case to restrain collection of a franchise fee charged against plaintiff as a foreign corporation for the privilege of exercising its franchise in Ohio. Plaintiff was a Delaware corporation.

The statute imposed an annual fee on foreign corporations, in addition to the initial fees otherwise prescribed, for the privilege of exercising its franchise in Ohio upon the proportion of the authorized capital stock of the corporation represented by property owned and used and business transacted in Ohio.

May 4, 1925—ALPHA CEMENT CO. v. MASS., 268 U. S. 203, 45 S. Ct. 477.

Suit for recovery of taxes assessed and exacted.

The statute provided that "every foreign corporation shall pay annually with respect to the carrying on or doing of business by it within the commonwealth, an excise equal to the sum of . . . five dollars per thousand and upon the value of the corporate excess employed by it within the commonwealth" and "two and one-half per cent of that part of its net income which is derived from business carried on within the commonwealth."

"The petitioner is a corporation organized under the laws of New Jersey. Its business is the manufacture and sale of cement. Its principal office is at Easton, Pa. Its mills are located in several other states outside of Massachusetts, from which shipments are made to various parts of the United States and to foreign countries. It maintains an office in Boston in charge of a district sales manager, with a clerk,

where its correspondence and other natural business activities in connection with the receipt of orders and shipments or goods for the New England states are conducted, etc."

June 9, 1919—AMERICAN MFG. CO. v. ST. LOUIS, 250 U. S. 459, 63 L. Ed. 1084.

Suit to recover back part of a municipal license tax.

The City of St. Louis, pursuant to a Missouri Statute, required every manufacturer in the city, before doing or offering to do business as such, to take out a license and pay, after report of business, a tax of $1 on each $1,000 of sales made.

The right to tax was sustained.

Oct. 29, 1888—ASHER v. TEXAS, 128 U. S. 129, 32 L. Ed. 368.

Case on writ of habeas corpus—

Statute involved act providing that there shall be levied on and collected "from every commercial traveler, drummer, salesman or solicitor of trade by sample or otherwise an annual occupation tax of thirty-five dollars, payable in advance;—to be paid to the comptroller," etc.

Asher was a citizen of the City of New Orleans, soliciting trade by use of samples for Charles G. Schulze, of New Orleans, as drummer in the City of Houston, Texas.

For not having taken out the required license he was arrested.

Nov. 19, 1923—BINDERUP v. PATHE EXCHANGE, 263 U. S. 291, 44 S. Ct. 96.

Action under the provisions of the Federal Anti-Trust Act.

The case holds, on commerce, that where motion picture films were manufactured in one state and leased to exhibitors in other states, the business is "interstate commerce" though the films were consigned to local agents of distributors to be held until delivered to lessees in the same state.

The Court points out that (311): "The cases cited by defendants in error, upholding state taxation as not constituting an interference with interstate commerce, are of little value to the inquiry here. It does not follow that because a thing is

subject to state taxation it is also immune from federal regulation under the Commerce Clause." Citing STAFFORD v. WALLACE, 258 U. S. 525; ADDYSTON PIPE LINE CO. v. UNITED STATES, 175 U. S. 211.

April 30, 1894—BRENNAN v. TITUSVILLE, 153 U. S. 289, 38 L. Ed. 719.

Conviction for not taking out license and paying the license fee.

The statute provided "that all persons canvassing or soliciting within said city orders for goods, books, paintings, wares, or merchandise of any kind, or persons delivering such articles under orders so obtained or solicited "shall procure a license to transact said business" and pay the tax. Failure to procure the license was punishable.

Brennan represented a manufacturer located in the State of Illinois.

Jan. Term, 1827—BROWN v. MARYLAND, 12 Wheat. 419, 6 L. Ed. 678.

Indictment in the City Court of Baltimore. Statute provided: "That all importers of foreign articles, or commodities, of dry goods, wares, or merchandise, by bale or package, or of wine, rum, brandy, whiskey and other distilled spirituous liquors, etc., and other persons selling the same by wholesale . . . shall . . . take out a license . . . for which they shall pay fifty dollars."

This indictment was against the importer, for selling a package of dry goods in the form in which it was imported.

Note: Overruled—5 How. 574, 587. 8 Wall 123.

Jan. 12, 1903—CALDWELL v. NORTH CAROLINA, 187 U. S. 622, 47 L. Ed. 336.

Involves the violation of an ordinance of the City of Greensboro requiring a license fee from persons engaged in selling or delivering picture frames or pictures.

Ordinance provided, "that every person engaged in the business of selling or deliving picture frames, pictures, photo-

graphs, or likeness of the human face, in the City of Greensboro, whether an order for the same shall have been previously taken or not, unless the said business is carried on by the same person in connection with some other business for which a license has already been paid to the city, shall pay a license tax of $10 for each year."

The defendant was employed by Chicago Portrait Company, a foreign corporation of Chicago, and was delivering certain pictures and frames in Greensboro for which contracts of sale had previously been made by other employees.

JAN. 1930—CARPENTER v. SHAW, 280 U. S. 363.

This case involved an Oklahoma tax upon "the owner of any royalty interest" in petroleum and natural gas, to the extent of 3 per cent. The petitioners, Choctaw Indians.

The court held that the tax was not permitted because of the Atoka Agreement with the Choctaw Indians.

May, 1936—CARTER v. CARTER COAL CO., 298 U. S. 238, 56 S. Ct. 855.

This case involves the "Bituminous Coal Conservation Act of 1935," and act of Congress.

The Court says that as used in the Constitution, the word "Commerce" is the equivalent of the phrase "intercourse for the purpose of trade," and includes TRANSPORTATION, PURCHASE, SALE, and EXCHANGE of commodities between the citizens of the different states.

The act was held unconstitutional as to the provisions considered.

May, 1932—CHAMPLIN REFINING CO. v. CORPORATION COMMISSION, 286 U. S. 210, 52 S. Ct. 559.

The Act of Oklahoma under consideration prohibits the production of petroleum in such a manner or under such conditions as constitute waste.

On the question of commerce the Court held that it is clear that the regulations prescribed and authorized by the act and the proration established by the commission apply only to

production and not to sales or transportation or crude oil or its products. This is "no violation of the commerce clause."

March, 1934—CHASSANIOL v. GREENWOOD, 291 U. S. 584, 54 S. Ct. 541.

The ordinance of Greenwood, Miss., imposed a tax upon every person engaged in the business of buying or selling cotton for himself within the city. Chassaniol contended that, though buying and selling for himself, the cotton was in interstate or foreign commerce, 90% being delivered to purchasers in other states.

The Court upheld the tax as a tax upon a local function or as being an occupation tax.

March 4, 1918—CHENEY BROS. v. MASSACHUSETTS, 246 U. S. 147, 62 L. Ed. 632.

A review of a judgment sustaining the validity of an excise tax imposed by Massachusetts on the defendant.

"We here are concerned with an excise tax imposed by Massachusetts in 1913, on each of seven foreign corporations on the ground that each was doing a local business in the State."

April 16, 1923—BOARD OF TRADE v. OLSEN, 262 U. S. 1, 43 S. Ct. 470.

Case involving the constitutionality of the Federal Grain Futures Act of 1922.

January, 1886—COE v. ERROL, 116 U. S. 517, 29 L. Ed. 715.

The tax here involved was imposed by the Town of Errol, New Hampshire, upon logs found within the town on the tax date, drawn from New Hampshire to be floated to the State of Maine to be manufactured and sold. At the time taxed, the logs had not begun their interstate trip.

The Court sustained the tax.

DEC. 1935—COLGATE v. HARVEY, 296 U. S. 404.

This case involved the Vermont Income and Franchise Tax Act of 1931, imposing individual income taxes. The statute was attacked as (1) imposing a tax upon dividends earned outside the state while exempting from tax dividends earned within the state; (2) discriminating in favor of money loaned within the state as against money loaned outside the state; and (3) arbitrarily denying exemption to appellant an exemption allowed to other persons with income from other sources.

The court concluded that the tax was valid in respect to the first and third points but invalid in respect to the second.

March 4, 1935—COONEY v. MOUNTAIN S. T. & T. CO., 294 U. S. 384, 55 S. Ct. 477.

Suit to restrain the enforcement of two acts of the Legislature of Montana, imposing annual license taxes.

The Laws of 1933, of Montana, imposed annual license tax for each telephone instrument used in the conduct of the business of operating or maintaining telephone lines and furnishing telephone service in the State of Montana.

Mountain States T. & T. Company was a Colorado corporation with system extending throughout seven states and a part of another, with 34,000 telephones in Montana.

March 7, 1887—CORSON v. MARYLAND, 120 U. S. 502, 30 L. Ed. 699.

Involves indictment for offering to sell and for selling by sample, in the City of Baltimore, without license, certain goods for a New York firm, to be shipped from New York directly to the purchaser.

The statute provided that, "no person or corporation other than the grower, maker or manufacturer shall barter or sell, or otherwise dispose of, or shall offer for sale any goods, chattels, wares, or merchandise within this State, without first obtaining a license in the manner herein prescribed."

April, 1938—COVERDALE v. PIPE LINE COMPANY, 303 U. S. 604, 58 S. Ct. 736.

Cited and discussed by defendant Maxwell in original brief.

Feb. 24, 1913—CRENSHAW v. ARKANSAS, 227 U. S. 389, 57 L. Ed. 565.

Case involving indictment for violating the peddling statute of the State of Arkansas.

The Statute provided, "that hereafter, before any person, either as owner, manufacturer, or agent, shall travel over and through any county and peddle or sell any lightning rod, steel stove range, clock, pump, buggy carriage, or other vehicle, or either of said articles, he shall procure a license, as hereinafter provided, from the county clerk of such county, authorizing such person to conduct such business."

Gannaway exhibited sample ranges and solicited and took orders and notes for ranges and Crenshaw acted as delivery man, both representing a range company at St. Louis, Missouri.

Dec. 1917—CREW LEVICK CO. v. PA., 245 U. S. 292, 62 L. Ed. 295.

The statute imposed an annual mercantile license tax upon wholesaler, retailer and venders on an exchange. A large portion of the Pennsylvania merchant's sales were upon orders taken in foreign countries and sent to the merchant who shipped direct to purchaser. A tax, under the statute, was imposed based upon the amount of gross annual receipts.

The question is whether a state can tax the business of selling in foreign commerce, or impose a tax, in effect, a regulation of foreign commerce or an impost upon exports.

The Court denied the right of the State of Pennsylvania to thus impose the tax.

May 25, 1891—CRUTCHER v. KENTUCKY, 141 U. S. 47, 35 L. Ed. 649.

Case upon an indictment in the State of Kentucky for acting and doing business as agent of the United Express Company,

alleged to be an express company not incorporated by the laws of Kentucky, but trading and doing business as a common carrier by express, of goods, etc., in and through the County and State of Kentucky, without having any license so to do either for himself of the company.

The statute provided, "that it shall not be lawful . . . for any agent of any express company, not incorporated by the laws of this Commonwealth, to set up, establish or carry on the business of transportation in this state, without first obtaining a license from the auditor of public accounts to carry on such business.

Dec. 1921—DAHNKE-WALKER CO. v. BOUDURANT, 257 U. S. 282, 42 S. Ct. 106.

This case was for damages for breach of a contract where the defense pleaded that the plaintiff corporation had not complied with the laws of Kentucky prescribing the conditions under which a foreign corporation could do business in that state. The plaintiff was only engaged in Kentucky in buying wheat and shipping it to its mill in Tennessee.

The Court held that the statute in question, which concededly imposed burdensome conditions, was as to that transaction invalid because repugnant to the commerce clause.

March, 1915—DAVIS v. VIRGINIA, 236 U. S. 697, 59 L. Ed. 795.

The plaintiff was convicted of peddling without a license. The statute is not set out in the opinion of the Court. The plaintiff represented a New York firm.

The Court held that an agent of a non-resident to whom the latter ships portraits made to fill orders taken by local solicitors, and in a separate parcel, frames suitable for such portraits, the orders for which contemplate delivery in appropriate frames which the customers may select, cannot be require to take out a peddler's license when engaged in putting the portraits into appropriate frames, delivering them, and offering the customers a choice of three different styles of frames, the customers taking one or more at their option.

March, 1907—DELAMATER v. SOUTH DAKOTA, 205 U. S. 93, 51 L. Ed. 724.

The Court in this case sustained a South Dakota law imposing a tax upon the business of selling in the state by any traveling salesman who solicits orders in quantities of less than 5 gallons as not being repugnant to the commerce clause in view of the provisions of the Wilson Act of 1890, that intoxicating liquors coming into the state shall be as completely under its control as if manufactured therein.

May, 1910—DOZIER v. ALABAMA, 218 U. S. 124, 54 L. Ed. 965.

The plaintiff was convicted for breach of an Alabama statute imposing a license tax on persons who did not have a permanent place of busines in the state, and also kept picture frames as a part of their stock in trade, if they solicited orders for the enlargement of photographs or pictures of any character, or for picture frames, whether they made charge for such frames or not, or if they sold or disposed of picture frames. The plaintiff represented a Chicago, Ill., firm, took the orders which were filled, and then made delivery without paying a license tax and without a permanent place of business in Alabama.

The Act was condemned.

Dec. 5, 1938—EDISON CO. v. LABOR BOARD, 305 U. S. 497, 59 S. Ct. 206.

This case involves an order of the National Labor Relations Board, created under the National Labor Relations Act under which, for the purposes of the Act, interstate commerce is defined.

JAN. 1931—EDUCATIONAL FILMS CORP. v. WARD, 282 U. S. 379.

This case involved an income tax of New York upon "entire net income" imposed for the privilege of exercising its franchise in New York in a corporate or organized capacity. The appellant owned copyrights and contended the tax was in-

valid as applied to copyrights because the copyrights were Federal instrumentalities.

The three-judge District Court dismissed the bill. This was affirmed by the Supreme Court.

Jan. 3, 1927—FEDERAL TRADE COMMISSION v. PACIFIC PAPER ASSOCIATION, 273 U. S. 52, 47 S. Ct. 255.

Case involving vadility of an order of Federal Trade Commission requiring respondents to cease and desist from certain competitive practices prohibited by The Federal Trade Commission Act.

OCT. 1928—FOSTER PACKING CO. v. HAYDEL, 278 U. S. 1.

This case involved the validity of the Louisiana "Shrimp Act" of 1926 which attempted to permit only residents or domestic corporations acquiring a qualified interest or property in shrimp taken in Louisiana. One of the petitioners was a Mississippi corporation shipping shrimp in interstate commerce.

The court found that the act favored the canning of the meat and the manufacture of bran in Louisiana by withholding raw or unshelled shrimp from the Mississippi company The act was held to obstruct and burden interstate commerce.

Feb. 24, 1931—FURST v. BREWSTER, 282 U. S. 493, 51 S. Ct. 295.

Here the Court held that an Arkansas Statute prohibiting a a foreign corporation to sue in the state courts where the statutory requirements had not been met by such corporation, was invalid as applied to a suit by such corporation based upon interstate transaction.

MAY, 1909—GALVESTON, HARRISBURG & RY. CO. v. TEXAS, 210 U. S. 217.

This case involved a Texas tax upon the gross income of railroad corporations and others owning or controlling a line of railroad in Texas. Much of the income of petitioner was derived from carrying interstate passengers and freight.

The court invalidated the tax as applying indiscriminately to gross receipts from commerce within as well as without the state.

February, 1824—GIBBONS v. OGDEN, 9 Wheat. 1, 6 L. Ed. 1.

HELD: The Statutes of the State of New York granting to Robert R. Livingston and Robert Fulton the exclusive navigation of all the waters within the jurisdiction of that State, with boats moved by fire or steam, for a term of years, are repugnant to the commerce clause of the Federal Constitution, so far as said Statutes prohibit vessels licensed, according to the laws of the United States, from carrying on the coasting trade, from navigating said waters by means of fire or steam.

Jan. 3, 1939—GWYN v. HENNEFORD, 305 U. S. 434, 59 S. Ct. (Adv. Sheet) 325. Action to restrain collection of a tax imposed under Washington State Statute, which levied a tax "for the privilege of engaging in business activities" within the state at the rate of a certain percentage of the gross income.

HELD: Invalid as applied to Washington Corporation, engaged as marketing agent for fruit growers cooperative, organizations in making sales and deliveries in other states of fruit grown in Washington, in collecting sales prices and remitting proceeds after deduction of expenses and its compensation.

Nov. 27, 1922—HEISLER v. THOMAS COLLIER CO., 260 U. S. 245, 43 S. Ct. 83.

Suit to enjoin enforcement of Pennsylvania Statute which provided that each ton of anthracite coal mined, "washed or screened, or otherwise prepared for market" in the State should be "subject to a tax of 1½% of the value thereof when prepared for market," the tax to be assessed when coal subjected to the indicated preparation "is ready for shipment or market." Suit dismissed.

HELD: Statute not invalid, as burden on interstate commerce, although a large percentage of coal in Pennsylvania is destined to be shipped to other states.

April 8. 1929—HELSON, et als v. KENTUCKY, 279 U. S. 245, 49 S. Ct. 279.

Kentucky Statute imposed tax of five cents per gallon on all gasoline sold within state at wholesale, and upon gasoline purchased without the state and sold, distributed or used within the state. In the suit, Kentucky sought to collect tax on gasoline purchased in Illinois—the 75% of it consumed within Kentucky—used in making an interstate journey.

HELD: Statute invalid as applied to stated facts because a violation of commerce clause. (Five to Four opinion)—"Distinguished" in EASTERN AIR TRANSPORT v. TAX COMMISSION, 285 U. S. 147, 52 S. Ct. 340, 341.

March 29, 1937—HENNEFORD v. SILAS MASON CO., 300 U. S. 577, 57 S. Ct. 524.

See discussion of this case, relied upon by the defendant Maxwell, in defendant's original brief.

Feb. 23, 1915—HEYMAN v. HAYS, 236 U. S. 178, 59 L. Ed. 527.

HELD: Tennessee Statute imposing privilege tax upon wholesale and retail liquor dealers is invalid as applied to a business of soliciting by mail orders for intoxicating liquors from persons in other states, and of delivering intoxicating liquors from an existing stock on hand in the state to a carrier for interstate shipment.

MOR. 1918—INTERNATIONAL PAPER COMPANY v. MASSACHUSETTS, 246 U. S. 135.

This is a suit by a New York Corporation to recover an excise tax assessed by Massachusetts as a condition of admitting the corporation, engaged in both local and interstate commerce, to engage in business in Massachusetts.

The court invalidated the tax as constituting an unlawful burden on interstate commerce.

April 4, 1910—INTERNATIONAL TEXTBOOK CO. v. PIGG, 217 U. S. 91, 54 L. Ed. 678.

Kansas Statute provided that "no action shall be be maintained or recovery had in any of the courts of this state by any corporation doing business in this state without first obtaining the certificate of the Secretary of State that statements (of corporation's financial condition) provided for in this section have been properly made."

HELD: Unconstitutional as applied to plaintiff, Pennsylvania Corporation, which failed to comply with statute, whose sole activity in Kansas was: soliciting, by agent, students for correspondence school courses, mailing needful books, papers, etc., to students, and collecting, by agent, tuition fees which were forwarded to home office.

FEB. 1916—KANSAS CITY RY. v. KANSAS (BOTKIN) 240 U. S. 227.

This case involved an annual tax of Kansas on domestic corporation, graduated according to the amount of the paid-up capital stock.

The court upheld the tax. . .

NOV. 1925—KANSAS CITY STEEL CO. v. ARKANSAS, 269 U. S. 148.

This case involves a penalty against a foreign corporation doing business in Arkansas without obtaining permission.

It was found that the corporation was doing business in Arkansas and the penalty was sustained.

Oct. 22, 1888—KIDD v. PEARSON, 128 U. S. 1, 32 L. Ed. 346.

Iowa Statute provided for the abating as a nuisance of any distillery used for the unlawful manufacture and sale of intoxicating liquors. All liquors manufactured by the defendant were shipped and sold out of the State of Iowa.

HELD: Statute valid and decree ordering distillery to be abated as nuisance affirmed.

April 12, 1937—LABOR BOARD CASES,

301 U. S. 1, 57 S. Ct. 615

301 U. S. 49, 57 S. Ct. 642

301 U. S. 58, 57 S. Ct. 645.

These cases all involved solely the Federal Statute known as the National Labor Relations Act which, for the purposes of the Act, defined interstate commerce.

MAY, 1932—LAWRENCE v. STATE TAX COMMISSION, 286 U. S. 276.

This case involved a Mississippi tax upon net income, which excluded from the income of a domestic corporation sums earned from sources without the state. The petitioner, an individual, engaged in constructing roads in Tennessee, attacked the law as giving the exemption to domestic corporations and not to individuals.

The court upheld the right to tax in this manner domestic corporations and citizens of Mississippi.

MAY, 1888—LELOUP v. PORT OF MOBILE, 127 U. S. 640.

This case involves the validity of an ordinance requiring a license fee of telegraph companies to do business in the Port of Mobile. The plaintiff was agent for the Western Union Telegraph Company.

The Court condemned the tax.

Dec. 10, 1917—LOONEY v. CRANE COMPANY, 245 U. S. 178, 62 L. Ed. 230.

Texas Statute imposed a tax as a condition of admitting a foreign corporation to do business in the State, based upon the amount of its authorized capital stock, and imposed a franchise tax based upon capital, surplus, and undivided profits.

HELD: As to a foreign corporation engaged in interstate commerce, the Statute is unconstitutional—in violation of commerce clause and due process clause of Federal Constitution.

APRIL, 1928—LOUISVILLE GAS CO. v. COLEMAN, 277 U. S. 32

The plaintiff in error, a Kentucky Corporation, presented a deed of trust for registration. A tax was assessed under an act which exempted indebtedness maturing within five years, and indebtedness to building and loan associations. The tax was challenged as not meeting the equal protection clause of the Federal Constitution.

The court held that equal services were rendered as to indebtedness maturing within five years and indebtedness maturing after five years. The extending of free service to the former and the taxing of the latter was held as an unreasonable classification.

APRIL, 1890—LYNG v. MICHIGAN, 135 U. S. 161.

This case involves a Michigan tax in connection with the manufacture and handling of liquors. The outsider was subjected to a tax which the resident did not have to pay.

The court invalidated the tax.

MAY, 1929—MACALLEN v. MASSACHUSETTS, 279 U. S. 620.

This case involved taxes assessed by Massachusetts against a corporation upon income which included bonds of the United States and bonds of Massachusetts which, when issued, were tax exempt.

The court invalidated the tax as to United States bonds as impairing the right of the Federal government to borrow money and as to the state bonds as impairing a contract.

May 19, 1890—McCALL v. CALIFORNIA, 136 U. S. 104, 34 L. Ed. 391.

An "Order" of City and County of San Francisco, imposed a municipal license tax of $20.00 per quarter for "every railroad agency." Violation of Order made a misdemeanor. McCall was agent in San Francisco, Cal., for a railroad corporation having its principal office in Illinois and operating a continu-

ous line of road between Chicago and New York, the agent's duty being to solicit passenger traffic over the line he represented. McCall was convicted under the "Order."

HELD: "Order" unconstitutional as applied to business of McCall, because repugnant to "Commerce Clause" of Federal Constitution.

FEB, 1940—McCARROLL v. DIXIE LINES, 309 U. S. 176.

This case involves the right of the State of Arkansas to require the payment of a gas tax upon all gasoline above twenty gallons before the bus of the defendant can enter the State line.

The tax was invalidated.

JAN. 1940—McGOLDRICK v. BERWIND-WHITE CO., 309 U. S. 33.

(This case is used in the brief of each party to this appeal and thus clearly presents the statute involved in the case.)

Nov. 6, 1933—MINNESOTA v. BLASIUS, 290 U. S. 1, 54 S. Ct. 34.

Minnesota Statute imposed general tax upon personal property levied against owner of property on certain date. On the date prescribed, Blasius, a trader in livestock at the St. Paul Union Stock Yards, owned and was in possession of 11 head of cattle purchased for resale; practically all cattle purchased by him was sold and shipped to non-residents of the State; the cattle in question were all sold to non-resident purchasers and shipped outside the State on the date mentioned and the day following.

HELD: Tax upon said cattle valid.

FEB. 1933—NASHVILLE C. & ST. L. RY. v. WALLACE, 288 U. S. 249.

This case involved a Tennessee tax on gasoline in storage in Tennessee, although the gasoline was withdrawn from

storage only for use mainly as an instrument in interstate commerce.

The Court sustained the tax.

JUNE, 1931—NEAR v. MINNESOTA, 283 U. S. 697.

This case involved a law of Minnesota declaring certain publications a nuisance. Only the question of the freedom of the press was involved.

The court condemned the statute.

Dec. 7, 1903—NORFOLK & WESTERN R. CO. v. SIMS, 191 U. S. 441, 48 L. Ed. 254.

HELD: The license tax imposed by a North Carolina Statute, upon all those "engaged in the business of selling" sewing machines in the State, is unconstitutional (in violation of commerce clause, insofar as applied to the sale of a single machine shipped into the State from Illinois by a non-resident manufacturing corporation, upon the written order of a customer, under an ordinary C.O.D. consignment.

MAY, 1911—OKLAHOMA v. KANSAS NAT. GAS CO., 221 U. S. 229.

This case involved an Oklahoma statute prohibiting the transportation across state lines of natural gas. The defendant was a Delaware Corporation preparing to transport through pipe lines natural gas from Oklahoma to other states.

The court denied the right of the state to thus regulate interstate commerce.

JAN., 1925—OZARK PIPE LINE v. NOMER, 266 U. S. 555.

This case involved an attempt of Missouri to collect an annual franchise tax from the plaintiff engaged in transporting petroleum by pipe line as a condition to the plaintiff engaging in business.

The court declared the law under which the collection of the tax was attempted unconstitutional as applied to plaintiff.

JULY, 1939—PEOPLE v. HORTON MOTOR LINES, 281 N. Y. 196.

This case involved the New York ordinances requiring that the business of operating public carts must be licensed. The defendant operated as a common carrier interstate.

The court held that shipments from other states to New York or from New York to other states was interstate commerce and that the defendant was not required to obtain a license under the ordinances.

Mar. 17, 1919—POSTAL TELEGRAPH-CABLE COMPANY v. RICHMOND, 249 U. S. 252, 63 L. Ed. 590.

Appeal from Federal District Court to review decree dismissing bill by telegraph company to enjoin collection of certain municipal license taxes imposed by ordinance by City of Richmond, Va. Ordinance imposed annual license tax of $300 "for the privilege of doing business within the City of Richmond, but not including business done to or from points without the State, and not including any business done for the Government of the United States." Other ordinance imposed an annual fee of $2.00 for each telegraph pole maintained or used in the streets of the city.

HELD: Decree affirmed. Ordinances valid. No burden on interstate commerce.

Nov. 8, 1937—PUGET SOUND CO. v. TAX COMMISSION, 302 U. S. 90, 58 S. Ct. 72.

Washington State Statute imposing tax upon business measured by gross receipts held: (1) invalid, as violation of commerce clause, insofar as it related to the business of a stevedore company of loading and discharging cargoes by longshoremen subject to the company's direction and control; the business being interstate or foreign commerce; (2) valid, as applied to the business of stevedoring company which consisted of supplying longshoremen to shipowners or masters without directing or controlling work of loading or unloading, such business not being interstate or foreign commerce.

May 25, 1925—REAL SILK MILLS v. PORTLAND, 268 U. S. 325, 45 S. Ct. 525.

An ordinance, imposing license tax on solicitors taking orders in Portland, Oregon, for hosiery to be shipped to buyers in Portland, Oregon, by the manufacturer in Illinois, was held invalid, because in violation of commerce clause.

Dec. 17, 1906—REARICK v. PENNSYLVANIA, 203 U. S. 507, 51 L. Ed. 295.

An ordinance of the borough of Sunbury, Penn., made it unlawful to solicit orders for, sell, or deliver, at retail, either on the streets or by traveling from house to house, foreign or domestic goods, not of the parties own manufacture or production, without a license, for which a large fee was required. The defendant (plaintiff in error) was employed by foreign corporation to solicit, within the municipality, orders for groceries which the company filled by shipping goods to him for delivery to customers, from whom defendant collected, the goods being shipped in distinct packages corresponding to the several orders, wrapped up conveniently for shipment.

HELD: Ordinance invalid because in violation of commerce clause.

Mar. 7, 1887—ROBBINS v. SHELBY, 120 U. S. 489, 30 L. Ed. 694.

Tennessee Statute provided: "All drummers, and all persons not having a regular licensed house of business in the Taxing District, offering for sale or selling goods, etc., therein, by sample shall be required to pay" $10 per week for such privilege. Statute held invalid, as a violation of the commerce clause, as applied to a drummer representing an Ohio dealer negotiating sales of articles to be shipped from Ohio to Tennessee.

Feb. 24, 1913—ROGERS v. ARKANSAS, 227 U. S. 401, 57 L. Ed. 569.

Plaintiff in error convicted of peddling buggies in Arkansas without having paid license or privilege tax required by Ar-

Kansas Statute: Plaintiff in error was a salesman of foreign company and traveled about exhibiting sample buggies in Arkansas. Orders are signed by purchasers and are sent to agent of company in Tennessee. There, the buggies are tagged with the names of the respective purchasers and shipped in carload lots to the place in Arkansas where they are delivered, consigned to the company.

HELD: Conviction set aside. Statute invalid as applied to defendant in error.

NOV., 1935—SCHUYKILL TRUST CO. v. PENNA., 296 U. S. 113.

This case involves a Pennsylvania tax on shares of capital stock. The plaintiff contended the tax as construed and applied discriminated against United States government bonds, bonds of federal instrumentalities, and national bank stock. The court sustained the contention of the plaintiff and condemned the tax.

June 11, 1923—SONNEBORN BROS. v. CURETON, 262 U. S. 504 (506), 43 S. Ct. 643.

Appellants transported oil from New York and elsewhere outside of Texas to their warehouses in Texas and the oil was there held for sales in Texas in original packages of transportation, and was subsequently sold and delivered in Texas in such original packages.

HELD: Texas Statute imposing occupation tax upon appellants based partially upon receipts from sale of oil transported into Texas and sold as stated, was valid and not a burden on interstate commerce.

Feb. 14, 1938—SOUTH CAROLINA v. BARNWELL BROS., 303 U. S. 177, 58 S. Ct. 510.

South Carolina Statute prohibiting use of State highways by certain types of trucks whose widths exceed 90 inches and whose weights exceed 20,000 pounds, is valid and is not a

violation of either the 14th Amendment or the commerce clause of the Federal Constitution even as applied to interstate motor carriers.

Jan. 30, 1939—SOUTHERN PACIFIC CO. v. GALLAGHER, 306 U. S. 167, 59 S. Ct. (Adv. Sheet) 389.

Under California use tax act which imposed a use tax on a consumer of tangible personal property for "use" or "storage," it was held that the tax was valid even as applied to articles ordered by an interstate railroad out of the State under specification suitable only for utilization in transportation facilities and installed immediately on arrival at California destination, the tax being effective at the moment when the articles reached the end of interstate transportation and had not begun to be consumed in interstate operation. The tax was held valid as against the contention that the act was violative of commerce clause of Federal Constitution.

Feb. 21, 1910—SOUTHERN RY. CO. v. GREENE, 216 U. S. 400, 54 L. Ed. 536.

HELD: A foreign railway corporation which has come into the state in compliance with its laws, and has therein acquired property, etc., is protected by U. S. Constitution against a state statute imposing an additional franchise tax for privilege of doing business within state, where no such tax is imposed upon domestic corporations carrying on a precisely similar business.

May 1, 1922—STAFFORD v. WALLACE, 258 U. S. 495, 42 S. Ct. 397.

Suit to enjoin enforcement of orders of the Secretary of Agriculture under the Federal "Packers and Stock Yards Act of 1921."

STATE OF LOUISIANA v. BEST & COMPANY, 194 La. 918; STATE v. YETTER, 192 S. C. I.

These two cases deal with the same tax involved in the appeal from the Supreme Court of North Carolina now under consideration.

MARCH, 1914—STEWART v. MICHIGAN, 232 U. S. 665.

This case involved the legality of a conviction of the Plaintiff in error for "taking orders for the purchase of foods, ware, and merchandise, by sample, lists, and catalogues, without having then and there obtained a license as a hawker and peddler, as required" by the laws of Michigan of 1897.

The court condemned the law under which the plaintiff in error was convicted.

April 7, 1902—STOCKARD v. MORGAN, 185 U. S. 27, 46 L. Ed. . . .

Tennessee statute imposed a privilege tax upon persons doing business as merchandise brokers.

HELD: Invalid as applied to brokers whose business is exclusively confined to soliciting orders from jobbers and wholesale dealers within the State, as agents for non-resident principals for goods to be shipped by such non-resident principals to such jobbers or dealers, because a violation of commerce clause.

Jan. 14, 1889—STOUTENBURG v. HENNICK, 129 U. S. 141, 32 L. Ed. 637.

Clause 3 of Section 21 of an Act of Legislative Assembly of District of Columbia (requiring a license to engage in any business, trace, etc.) provided: "Commercial agents shall pay $200 annually. Every person whose business it is, as agent, to offer for sale goods, wares, or merchandise by sample, catalogue or otherwise, shall be regarded as a commercial agent."

The defendant was agent for a Maryland concern, engaged in soliciting orders in D. C., to be shipped from Md., into D. C. He had no license and was convicted and imprisoned. His release in Habeas Corpus Proceeding was affirmed, the Court holding that Congress did not delegate to the Legislative Assembly of the District of Columbia power to enact Clause 3 of Section 21 of the Act—quoted above.

Jan. 30, 1905—SWIFT & CO. v. UNITED STATES, 196 U. S. 375, 49 L. Ed. 518.

Suit to enjoin violations of Federal Statute known as the "Sherman Anti-Trust Act."

Feb. 18, 1924—TEXAS T. CO v. NEW ORLEANS, 264 U. S. 150, 44 S. Ct. 242.

Court held unconstitutional a municipal ordinance imposing a license tax on a company acting as steamship agent for certain steamship companies exclusively engaged in interstate or foreign commerce, in soliciting cargo, arranging for its acceptance, issuing bills of lading, etc., the agent being paid a commission on the gross freight charges. The ordinance violated the commerce clause of Federal Constitution.

1852—VEAZIE v. MOORE, 14 How. 568, 14 L. Ed. 545.

A law of the State of Maine granted privileges of exclusive navigation of the upper waters of the Penobscot River. The river is entirely within the State of Maine.

HELD: Statute valid and not in conflict with the commerce clause, and a license granted by Federal officials to defendant in error to carry on the coasting trade did not entitle defendant to navigate the upper waters of said river.

Dec. 8, 1919—WAGNER v. CITY OF COVINGTON, 251 U. S. 95, 64 L. Ed. 157.

A municipal ordinance required all wholesalers of soft drinks to take out a license and pay fees therefor.

HELD: Valid and constitutional, as applied to a non-resident (Ohio) manufacturer of soft drinks doing a business in the (Kentucky) municipality which largely consists in carrying a supply of such drinks from one retailer's place of business to another's upon the truck in which the goods were brought across the State line from Ohio into Kentucky, exposing them for sale, soliciting and negotiating sales, and immediately delivering the goods sold in the original unbroken cases.

Jan. 4, 1918—WEEKS v. UNITED STATES, 245 U. S. 618, 62 L. Ed. 513.

Case involved a prosecution under Federal Act prohibiting misbranding of foods shipped in interstate commerce.

Jan. 17, 1876—WELTON v. MISSOURI, 91 U. S. 275, 23 L. Ed. 347.

Missouri Statute provided that persons who deal in the sale of goods, etc., not the growth, produce or manufacture of the State of Missouri, by going from place to place to sell them in the State should pay a license tax. No license was required of persons selling, in a similar way, goods which were the growth, produce, etc., of the State.

HELD: Statute invalid because in conflict with commerce clause of Federal Constitution.

Feb. 28, 1938—WESTERN LIVESTOCK v. BUREAU OF REVENUE, et al., 303 U. S. 250; 58 S. Ct. 546.

This case cited and discussed in the original brief of defendant Maxwell.

APPENDIX B

N. C. Public Laws of 1937, Chapter 127.

Sec. 404. *Definitions.*

For the purposes of this article:—

5. The words "retail merchant" shall mean every person who engages in the business of buying or acquiring, by consignment or otherwise, any articles of commerce and selling same at retail.

Sec. 405. *Taxes Levied.*

If any person, after the thirtieth day of June, one thousand nine hundred thirty-seven, shall engage or continue in any business for which a privilege tax is imposed by this article, such person shall apply for and obtain from the commissioner, upon the payment of the sum of one dollar ($1.00) a license to engage in and conduct such business upon the condition that such person shall pay the tax accruing to the State of North Carolina under the provisions of this article; and he shall thereby be duly licensed to engage in and conduct such business. The license tax levied in this section shall be a continuing license until revoked for failure to comply with the provisions of this article. License issued under Article V, Chapter four hundred forty-five, Public Laws of one thousand nine hundred thirty-three, for the year one thousand nine hundred thirty-four, one thousand nine hundred thirty-five, and under Chapter three hundred seventy-one, Public Laws of one thousand nine hundred thirty-five, for the biennium one thousand nine hundred thirty-five, one thousand nine hundred thirty-seven, shall be deemed a continuing license under this section.

An additional tax is hereby levied for the privilege of engaging or continuing in the business of selling tangible personal property, as follows:

(a) Wholesale merchants. Upon every wholesale merchant as defined in this article, an annual license tax of ten dollars ($10.00). Such annual license shall be paid in advance within the first fifteen days of July in each year or, in the case of a new business, within fifteen days after business is commenced. There is also levied on each wholesale merchant an additional tax of one-twentieth of one per cent (1/20th of 1%) of the total gross sales of the business.

The sale of any article of merchandise by any "wholesale merchant" to any one other than a merchant for resale shall be taxable at the rate of tax provided in this article upon the retail sale of merchandise. In the interpretation of this article the sale of any articles of commerce by any "wholesale merchant" to any one not taxable under this article as a "retail merchant," except as otherwise provided in this article, shall be taxable by the wholesale merchant at the rate of tax provided in this article upon the retail sale of merchandise. The Commissioner of Revenue is authorized to make appropriate regulations, consistent with this article to prevent abuse with respect to existing regulations defining transactions entitled to the rate of tax levied on sales at wholesale.

(b) Retail merchants. Upon every retail merchant, as defined in this article, a tax of three per cent (3%) of the total gross sales of the business of every such retail merchant: *Provided,* however, the maximum tax that shall be imposed upon the sale of any single article of merchandise shall be fifteen dollars ($15.00).

(c) Motor vehicles. In addition to the taxes levied in this article or in any other law, there is hereby levied and imposed upon every person, for the privilege of using the streets and highways of this State, a tax of three per cent (3%) of the sales or purchase price of any new or used motor vehicle purchased or acquired for use on the streets and highways of this State requiring registration thereof under the Motor Vehicle Laws of this State, which said amount shall not exceed fifteen dollars ($15.00), and shall be paid to the Commissioner of Revenue at the time of applying for certificate of title or registration of such motor vehicle. No certificate of title or registration plate shall be issued for same unless and until said

tax has been paid. *Provided, however,* if such person so applying for certificate of title or registration and license plate for such motor vehicle shall furnish to the Commissioner of Revenue a certificate from a motor vehicle dealer licensed to do business in this State, upon a form furnished by the commissioner, certifying that such person has paid the tax thereon levied in this article, the tax herein levied shall be remitted to such person to avoid in effect double taxation on said motor vehicle under this article. The term "motor vehicle" as used in this section shall include trailers.

N. C. Public Laws of 1937, Chapter 127, Section 121(e).

(e) Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars ($250.00), which license shall entitle such person, firm or corporation to display such samples, goods, wares, or merchandise, in any county in this State.

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SUPREME COURT OF THE UNITED STATES.

No. 61.—October Term, 1940.

Best & Company, Inc., Appellant,
vs.
A. J. Maxwell, Commissioner of Revenue for the State of North Carolina.

Appeal from the Supreme Court of the State of North Carolina.

[December 23, 1940.]

Mr. Justice Reed delivered the opinion of the Court.

Appellant, a New York retail merchandise establishment, rented a display room in a North Carolina hotel for several days during February, 1938, and took orders for goods corresponding to samples; it filled the orders by shipping direct to the customers from New York City. Before using the room appellant paid under protest the tax required by chapter 127, section 121(e), of the North Carolina Laws of 1937, which levies an annual privilege tax of $250 on every person or corporation, not a regular retail merchant in the state, who displays samples in any hotel room rented or occupied temporarily for the purpose of securing retail orders.[1] Appellant not being a regular retail merchant of North Carolina admittedly comes within the statute. Asserting, however, that the tax was unconstitutional, especially in view of the commerce clause, it brought this suit for a refund and succeeded in the trial court. The Supreme Court of North Carolina reversed and then, being evenly divided on rehearing, allowed the reversal to stand.[2] The

[1] "(e) Every person, firm, or corporation, not being a regular retail merchant in the State of North Carolina, who shall display samples, goods, wares, or merchandise in any hotel room, or in any house rented or occupied temporarily, for the purpose of securing orders for the retail sale of such goods, wares, or merchandise so displayed, shall apply for in advance and procure a State license from the Commissioner of Revenue for the privilege of displaying such samples, goods, wares, or merchandise, and shall pay an annual privilege tax of two hundred fifty dollars ($250.00), which license shall entitle such person, firm or corporation to display such samples, goods, wares, or merchandise in any county in this State."

[2] 216 N. C. 114; 217 N. C. 134.

prevailing opinion characterized the tax as one on the commercial use of temporary quarters, which in its operation did not discriminate against interstate commerce and therefore did not come into conflict with the commerce clause.

The commerce clause forbids discrimination, whether forthright or ingenious.[3] In each case it is our duty to determine whether the statute under attack, whatever its name may be, will in its practical operation work discrimination against interstate commerce. This standard we think condemns the tax at bar. Nominally the statute taxes all who are not regular retail merchants in North Carolina, regardless of whether they are residents or nonresidents. We must assume, however, on this record that those North Carolina residents competing with appellant for the sale of similar merchandise will normally be regular retail merchants. The retail stores of the state are the natural outlets for merchandise, not those who sell only by sample. Some of these local shops may, like appellant, rent temporary display rooms in sections of North Carolina where they have no permanent store, but even these escape the tax at bar because the location of their central retail store somewhere within the state will qualify them as "regular retail merchants in the State of North Carolina." The only corresponding fixed-sum license tax to which appellant's real competitors are subject is a tax of $1 per annum for the privilege of doing business.[4] Nonresidents wishing to display their wares must either establish themselves as regular North Carolina retail merchants at prohibitive expense, or else pay this $250 tax that bears no relation to actual or probable sales but must be paid in advance no matter how small the sales turn out to be. Interstate commerce can hardly survive in so hostile an atmosphere. A $250 investment in advance, required of out-of-state retailers but not of their real local competitors, can operate only to discourage and hinder the appearance of interstate commerce in the North Carolina

[3] Welton *v.* Missouri, 91 U. S. 275, 282-83; Guy *v.* Baltimore, 100 U. S. 434; Webber *v.* Virginia, 103 U. S. 344; Hale *v.* Bimco Trading Co., 306 U. S. 375. In McGoldrick *v.* Berwind-White Co., 309 U. S. 33, we pointed out that the line of decisions following Robbins *v.* Shelby County, 120 U. S. 489, read in their proper historical setting, rested on the actual and potential discrimination inherent in certain fixed-sum license taxes (pp. 55-57). There is no occasion now to reexamine the particular tax statutes involved in these cases.

[4] North Carolina Laws of 1937, c. 127, § 405.

retail market. Extrastate merchants would be compelled to turn over their North Carolina trade to regular local merchants selling by sample. North Carolina regular retail mechants would benefit, but to the same extent the commerce of the Nation would suffer discrimination.

The freedom of commerce which allows the merchants of each state a regional or national market for their goods is not to be fettered by legislation, the actual effect of which is to discriminate in favor of intrastate businesses, whatever may be the ostensible reach of the language.[5]

Judgment reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

END

[5] Cf. Bacardi Corporation v. Domenech, No. 21 this Term, decided December 1940, pp. 4-5.